

Garrett S. Garfield, WSBA No. 48375
E-mail: garrett.garfield@hklaw.com
HOLLAND & KNIGHT LLP
601 SW Second Avenue, Suite 1800
Portland, Oregon 97204
Telephone: 503.243.2300
Fax: 503.241.8014

Hon. Mary Jo Heston
Chapter 11
Hearing Date: March 20, 2024
Hearing Time: 9:00 a.m.
Hearing Location: ZoomGov
Response Date: n/a

Attorneys for Cerner Middle East Limited

UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF WASHINGTON AT TACOMA

In re:

VANDEVCO LIMITED and ORLAND LTD.,
Debtors.

Case Nos:

20-42710-MJH (Lead Case)

20-42711-MJH (Jointly administered under
Case No. 20-42710-MJH)

Chapter 11

**CERNER MIDDLE EAST
LIMITED'S REQUEST FOR
DISCOVERY SANCTIONS
(SUBMITTED IN ADVANCE OF
EMERGENCY HEARING ON
MARCH 20, 2024)**

NOW COMES Cerner Middle East Limited (“Cerner”), by and through its counsel Holland & Knight LLP, and makes the following submission in advance of the status conference scheduled by the Court for March 20, 2024, as authorized by the Court’s Order Setting Status Conference (ECF No. 1323). Cerner requests that the Court enter sanctions pursuant to Fed. R. Civ. P. 37 (as incorporated by Fed. R. Bankr. P. 7037 and 9014(c)) against the Debtors Vandevco Limited (“Vandevco”) and Orland Ltd. (together, “Debtors”) in response to their untimely and prejudicial production of tens of thousands of pages of materials, in violation of this Court’s previous Order on Motions to Compel requiring that these materials be produced by a specific date (See ECF No. 691; *see also* ECF No. 937 (extending deadline to May 1, 2023).)

CERNER MIDDLE EAST LIMITED’S
REQUEST FOR DISCOVERY SANCTIONS: CASE NO. 20-
42710-MJH– PAGE 1

HOLLAND & KNIGHT LLP
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Portland, Oregon 97204
Telephone: 503.243.2300

1 Cerner requests specifically that the Court enter an order precluding the Debtors and their
2 experts from:

- 3 (1) relying on or introducing any of the belatedly-produced materials;
- 4 (2) presenting any testimonial or documentary evidence based on such materials; and
- 5 (3) from opposing Cerner's introduction or characterization of any such materials to
6 support Cerner's claim.

7 (To be clear, such materials can be easily identified as all those having a bates number of
8 BELB0066094 or higher.)

9 Such relief is in accord with this Court's existing Order on Motions to Compel, which
10 precluded the Debtors from presenting testimonial or documentary evidence based on
11 electronically stored information that the Debtors had failed to preserve or produce, unless such
12 material were timely produced. (See ECF No. 691 at 16.) Moreover, even if Cerner is able to
13 accomplish a reasonable review of the new materials (at a significantly higher cost), it would
14 nonetheless be precluded from using them in depositions, and will be forced to incorporate them
15 into its trial strategy on a rushed basis without the benefit of full discovery. Numerous authorities
16 hold that this circumstance creates prejudice justifying sanctions.

17 Next, Cerner further requests an award of fees and costs under Fed. R. Civ. P. 37(b)(2)(C).
18 In the face of the belated production, Cerner faces significantly higher costs to review the new
19 materials. If the materials had been timely produced, they could have been included in the review
20 of the previously-produced materials using lower cost document review vendors. That is now not
21 possible given the very short timeframe remaining, exacerbating the burden and prejudice to
22 Cerner and justifying an award of fees and costs.

23 Finally, this submission is made on an abbreviated timeframe, both because of the time-
24 sensitive nature of the issue as set out in Cerner's letter to the Court (ECF No. 1317), and in
25 response to the Court's direction authorizing supportive pleadings on a shortened timeframe (ECF
26 No. 1323). Cerner accordingly reserves the right to request further sanctions, including but not

1 limited to terminating sanctions under Fed. R. Civ. P 37(b)(2)(A)(v), and any other relief as may
2 be shown to be appropriate by further developments or rulings by the Court.

3 INTRODUCTION

4 From the very outset of this matter, the Debtors and Belbadi Enterprises's ("**Belbadi**")
5 obstructive discovery conduct, including spoliation of evidence and outright refusal to participate
6 in discovery, has made this case much more burdensome and cumbersome than necessary. There
7 can be no genuine dispute that Belbadi owes Cerner more than \$60 million under the Guarantees,
8 leaving only the question of Belbadi's alter ego relationship with the Debtors. Yet discovery on
9 that issue has been obstructed at every conceivable opportunity, requiring among other things the
10 report of an independent examiner (ECF No. 614), and this Court's subsequent Order on Motions
11 to Compel (ECF No. 691.)

12 Cerner now once again urgently seeks relief from this Court to counteract the extreme
13 prejudice caused by the Debtors' recent untimely productions, on March 8 and March 13, of close
14 to 60,000 pages of material.¹ These productions appear to contain materials from the UAE that
15 relate to the Debtors assets and liabilities, capital structure, and businesses, which are damaging to
16 the Debtors' positions in the upcoming hearing set for April 29, 2024, but which have not been
17 previously produced. The belated production is in violation of this Court's previous Order on
18 Motions to Compel, which required *timely* production within 30 days (as later extended to May,
19 2023). The belated production prejudices Cerner, and imposes significant cost and burden. In the
20 circumstances, sanctions in the form of evidentiary restrictions against the Debtors, as well as an
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26 ¹ The second production occurred after Cerner had already submitted its emergency request for a hearing to the Court on March 11, 2024.

award of costs and fees to Cerner, is the only feasible remedy to the prejudice caused by the Debtors' untimely production of this huge volume of materials.

JURISDICTION AND VENUE

This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1334 and 157. Venue is proper in this District pursuant to 28 U.S.C. § 1410. The bases for relief are Federal Rule of Civil Procedure 37 (as incorporated by Federal Rules of Bankruptcy Procedure 7037 and 9014(c)).

BACKGROUND

The long history of this matter and the extreme difficulties Cerner has faced in seeking discovery from Debtors and from Belbadi are well known to the Court, and Cerner does not repeat it here. In short, on April 26, 2022, this Court entered its Order on Cerner's Motions to Compel, holding that "Debtors are prohibited from presenting *any* testimonial or documentary evidence that is (1) based on electronically stored information, (2) related to the Debtors' assets and liabilities, capital structure, and businesses (3) previously under their control, (4) that they failed to preserve, and (5) to which Cerner does not have access." (ECF No. 691 at 16.) The Order went on to provide that the evidentiary sanctions would not apply if "prior to the evidentiary hearing and no later than 30 days from the date of this Order, the Debtors or Belbadi provide Cerner with such spoliated ESI . . ." (*Id.*)

The 30-day deadline in the Court's order was then repeatedly continued, with Cerner's good faith consent, and calendar dates in this bankruptcy were continued in order to permit time for gathering and production of materials from the UAE. On April 14, 2023, the Court entered a further order providing that the deadline for production would be extended to May 1, 2023, and setting a status conference on July 11, 2023. (ECF No. 937). On May 10, 2023, the Debtors, through their e-discovery vendor Kroll, made a production of approximately 38,000 documents gathered from Belbadi in the UAE. (Garfield Decl. ¶ 2.) At the status conference on July 11, 2023, Debtors' counsel then explained that there were "a few minor issues" that the parties were working through. (ECF No. 1010 at 6 (Tr. 5:19–6:9).) Following on counsel's discussion of those minor

1 issues, a follow-on production of approximately 125 additional pages was made on August 8, 2023,
2 representing documents where it had appeared that the entire family may not have been produced
3 initially. (Garfield Decl. ¶ 3.)² At that time there was no indication that the production was not
4 substantially complete.

5 Cerner next worked diligently to review the new materials gathered from Belbadi in the
6 UAE, found that many of them were indeed highly relevant and extremely damaging to Debtors'
7 position,³ and proceeded with further litigation, including depositions of the Debtors' principals,
8 Ziad Elhindi ("Elhindi") (on December 18, 2023) and Nawzad Othman ("Othman") (on
9 December 19, 2023). (Garfield Decl. ¶ 4.) Other activity in the case—including but not limited to
10 this Court's scheduling of the hearing set for April 29, 2024 and the entry of a case schedule—has
11 likewise proceeded on the assumption that the spoliated UAE materials had been properly gathered
12 and timely produced in accordance with the Court's Order on Motions to Compel (as extended).⁴

13 However, on Friday, March 8, 2024, just days before the scheduled close of discovery and
14 disclosure of experts, the Debtors then made an enormous production of data comprising over
15 30,000 pages of documents. (Garfield Decl. ¶ 5.) Cerner promptly raised with the Court the
16 obvious prejudice this untimely production caused by filing an emergency letter on the following
17 Monday, March 11, 2024, along with a proposed order extending the deadlines for expert
18 disclosures in this matter. (*See* ECF No. 1317.)

19 Debtors then advised that they would be producing yet another supplemental production.
20 On March 13, 2024, the Debtors produced an additional 30,000 pages of material (Garfield Decl.

21
22 ² Cerner did not object to the May 10, 2023 or August 8, 2023 productions as untimely, in an effort to accommodate
23 the inherent difficulties in a major production of electronic evidence. However, the more recent productions are
24 untimely and in violation of the Court's existing Order requiring timely production.

25 ³ As just one example, it was revealed that Belbadi's audited financial statements produced annually for more than a
26 decade reflect a large debt owed directly by Vandevco. The Debtors themselves were forced to acknowledge this in
their own filings and schedules in this matter. *See* ECF No. 1045-2.

⁴ Cerner does not necessarily concede that the initial production was necessarily complete or proper in all respects.
However, the production was substantial and did include many relevant items, as noted above.

¶ 7), bringing the total produced in the last week to approximately 60,000 pages, significantly more than even the substantial initial production in May, 2023 of fewer than 40,000 pages, which was understood to be essentially a complete production of the spoliated UAE materials.

Based on telephone conferrals between counsel, Cerner understands Debtors' position to be that the supplemental productions were the result of some kind of technical glitches that were not realized until after the deposition of Elhindi and Othman and the further motion practice in connection with Cerner's motion to execute on the UAE Judgment against Belbadi. (Garfield Decl. ¶ 6.) In the limited time available, Cerner has not been able to analyze the data to confirm whether that is the case. But, regardless of the reasons, the prejudice to Cerner, as well as the substantial burden and cost, of receiving approximately 60,000 pages of material at the close of discovery is palpable. The situation requires the Court's immediate intervention if the hearing in this matter is to proceed in anything remotely resembling fairness to Cerner and on the current schedule, which it should in order to prevent further waste of estate resources.

POINTS AND AUTHORITIES

I. Applicable Law

Federal Rule of Civil Procedure 37(a)(3)(B) (incorporated here by Federal Rules of Bankruptcy Procedure 7037 and 9014(c)) provides for sanctions for discovery violations, including "prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence; and dismissing the action or proceeding in whole or in part." Fed. R. Civ. P. 37(b)(2)(A)(ii), (iv).

Authorities imposing sanctions under Rule 37—up to and including dismissal—are very clear that belated and prejudicial production of documents is not in keeping with the rules and does not avoid sanctions. Rather, the Ninth Circuit has "squarely rejected the notion that a failure to comply with the rules of discovery is purged by belated compliance." *Anheuser-Busch, Inc. v. Natural Beverage Distributors*, 69 F.3d 337, 354 (9th Cir. 1995). Similarly, "[l]ast minute tender of documents does not cure the prejudice to the opponents nor does it restore to other litigants on

1 a crowded docket the opportunity to use the courts.” *Payne v. Exxon Corp.*, 121 F.3d 503, 508 (9th
2 Cir. 1997).

3 Courts further note that the prejudice from an untimely production arises because it
4 deprives the other party of the opportunity to fairly use the materials in depositions on in
5 connection with trial preparation. *See Curtis v. Illumination Arts, Inc.*, No. C12-0991JLR, 2013
6 WL 6173799, at *17 (W.D. Wash. Nov. 21, 2013) (“Even Defendants’ last minute production of
7 additional documents has not remedied Plaintiffs’ prejudice. Due to their late production, Plaintiffs
8 have had no opportunity to utilize the documents in depositions or otherwise to flesh out the record
9 . . .”). The same rationale was held to support sanctions of dismissal in *Payne v. Exxon*, where
10 “[t]he issue is not whether [defendants] eventually obtained the information that they needed, or
11 whether plaintiffs are now willing to provide it, but whether plaintiffs’ repeated failure to provide
12 documents and information in a timely fashion prejudiced the ability of [defendants] to prepare
13 their case for trial.” *Payne*, 121 F.3d at 508.

14 Furthermore, sanctions can be awarded even in the event that violation of an existing order
15 is claimed to be unintentional. *See Lucas Auto. Eng’g v. Bridgestone/Firestone Inc.*, 275 F.3d
16 762, 769 (9th Cir. 2001) (affirming sanctions where party asserted that failure to appear was not
17 intentional); *Krishnan v. Cambria Health Sols. Inc.*, No. 2:20-cv-00574-TL, 2022 WL 1468892,
18 at *3 (W.D. Wash. May 10, 2022) (awarding sanctions after party made a sizable production of
19 documents less than two weeks before the end of the discovery period, which “deprived [the party]
20 of a significant majority of documentary evidence they had a right to when considering and
21 preparing for discovery, including depositions”); *United Artists Corp. v. United Artist Studios*
22 *LLC*, No. 2:19-cv-00828-MWF-MAA, 2019 WL 4640403, at *3-4 (C.D. Cal. Aug. 28, 2019)
23 (rejecting “unintentional delay” as a defense to a belated production and awarding sanctions).

24 Finally, Fed. R. Civ. P. 37(b)(2)(C) provides that in connection with a party’s failure to
25 comply with a discovery order: “the court must order the disobedient party, the attorney advising
26 that party, or both to pay the reasonable expenses, including attorney’s fees, caused by the failure,

1 unless the failure was substantially justified or other circumstances make an award of expenses
2 unjust.” Federal courts are also permitted to use their inherent authority to issue sanction awards
3 for fees and costs even if there is overlap with Fed. R. Civ. P. 37. *See Goodyear Tire & Rubber*
4 *Co. v. Haeger*, 137 S. Ct. 1178, 1186 (2017).

5 **II. The Debtors’ Belated And Massive Production Violates The Court’s Existing Order**
6 **And Is Extremely Prejudicial—The Court Should Renew The Evidentiary Sanctions**
7 **It Has Already Entered**

8 This Court need not reinvent the wheel in considering this latest instance of prejudicial
9 discovery conduct by the Debtors. Indeed, the Court has *already ruled* on April 26, 2022, that if
10 the spoliated materials from the UAE were not timely produced within 30 days, the Debtors would
11 be subject to evidentiary sanctions limiting their presentation of testimonial or documentary
12 evidence. *See* Order on Motions to Compel (ECF No. 691). That deadline was then extended
13 repeatedly, with Cerner’s good faith consent, to May 1, 2023 (*see* ECF No. 937)⁵, and Cerner did
14 not object to further leeway for the large production of electronic data that ultimately occurred on
15 May 10, 2023.⁶ However, production of huge amounts of additional data almost nine months later
16 does not comply with the Court’s Order on Motions to Compel. The violation is clear—an
17 enormous amount of material directly subject to the Court’s order was not produced within the
18 required timeframe.

19 To the contrary, the Court’s deadline for production has long since passed, and the parties
20 have been litigating for months with the understanding that the Court’s Order had been followed,
21 and that the Debtors had obtained from Belbadi and produced all of the spoliated materials relating
22 to the Debtors’ assets and liabilities, capital structure, and businesses. Cerner expended significant
23 resources reviewing and digesting the materials that were produced in May, and prepared its trial
24 strategy accordingly. Crucial depositions have already occurred based on the previous
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26 ⁵ Only the extension of the deadline allowed Debtors to “avoid imposition of evidentiary sanctions.” *Id.* at 2.

⁶ Or to the small follow-on production on August 8, 2023 to address some minor issues.

1 production—including motion practice regarding conducting the depositions in-person, and this
2 case is now rapidly moving toward an April 29, 2024 hearing date.

3 Nor is this a situation where the supplemental productions are relatively minor or simply
4 close off loose ends. Instead, the belated productions represent approximately 60,000 pages of
5 materials, of which Cerner’s initial attempts at analytics suggest approximately 70% may be new.
6 Although it has not yet been possible for Cerner to fully examine the newly-produced materials
7 (and will not be possible without considerable time and expense), the limited review that has been
8 able to occur to date shows that there are indeed relevant and damaging materials in the belated
9 production, which have not been previously made available to Cerner. For example:

- 10 • August 20, 2013 (BELB0070449) and November 26, 2014 (BELB0070992) debt
11 confirmation forms signed by Elhindi on behalf of Vandevco, and confirming the existence
12 of a substantial debt to Belbadi to Belbadi’s auditor, KPMG. Moreover the 2013
13 confirmation form is included in a packet of similar confirmations signed by other of
14 Belbadi’s direct subsidiaries, strongly suggesting that Elhindi (and therefore Vandevco, of
15 which he was the president) knew that Vandevco and its debt were treated in the same
16 manner as other direct subsidiaries of Belbadi.
- 17 • April 19, 2017 (BELB0084544) email chain including Elhindi, Othman, Belbadi founder
18 and CEO Ahmed Saeed Al Badi Al Dhaheri (“**Al Badi**”), Kenton Barnes, and others
19 regarding payment of Mr. Barnes’s fees from condominium closings, and Union National
20 Bank’s (the lender to Belbadi) insistence that “The fees submitted by Vandevco’s attorney
21 do not appear to have anything to do with the condominium sales and therefor are not
22 properly taken out of the condo sales.” This likewise strongly suggests an instance of funds
23 being improperly diverted from the Belbadi Group corporate structure. The chain also
24 includes directions given directly from Al Badi regarding specific treatment of the legal
25 fees and the dealings with Union National Bank, demonstrating his ongoing control and
26 domination over Vandevco’s business.

- June 19, 2017 (BELB0084746) email chain between Othman and Elhindi attaching a “Passive Principal Certificate,” dated June 1, 2016, signed by Al Badi, and falsely certifying that he has “limited or no decision making pwer over” the relevant Vandevco subsidiary. Previously, only an unsigned version of this form had ever been produced, and in his 2020 deposition, Othman had stated that he was sure the form had never been signed.

Each of these items are highly relevant to the alter ego relationship between the Belbadi Group and the Debtors. Moreover, they are extremely likely to represent merely the tip of the iceberg, as they are simply the few items Cerner has been able to sift out in the very short time it has had to review the huge volume of documents in the belated production.⁷ However, having received these materials only at the close of discovery and very shortly before expert disclosures, Cerner is prevented from introducing them at deposition and fleshing out the record, and from fully and fairly analyzing them in connection with the existing evidence in the case.

These circumstances are exactly those which federal courts in this district have held warrant imposition of sanctions under Rule 37. *See, e.g., Illumination Arts, Inc.*, 2013 WL 6173799, at *17 (“Due to their late production, Plaintiffs have had no opportunity to utilize the documents in depositions or otherwise to flesh out the record . . .”); *Cambria Health Sols. Inc.*, No. 2:20-cv-00574-TL, 2022 WL 1468892, at *3 (W.D. Wash. May 10, 2022) (belated production “deprived [the party] of a significant majority of documentary evidence they had a right to when considering and preparing for discovery, including depositions”); *see also Payne*, 121 F.3d at 508. Finally, the fact that the Debtors’ untimely production in this case follows on a previous order finding that they had spoliated these very materials only drives the point home—the prejudice to Cerner is undeniable and can only be rectified by the imposition of evidentiary sanctions against the Debtors.

⁷ The productions also appear to contain complex and lengthy financial records, including ledgers, contracts, and bank account and financial statements, which are even more difficult to review.

1 **III. Cerner Faces Substantial Burden And Costs.**

2 Cerner has been and is continuing to work to onboard, organize, analyze, and review the
3 massive new production of data from the Debtors. But, completing anything like a full and fair
4 review in the time available would dispirit an insomniac, and will involve significant cost and
5 burden that could and should have been mitigated by timely production. If the materials had been
6 properly produced initially, all responsive documents could and would have been subject to initial
7 review using lower cost document review vendors, and with the benefits and efficiencies of a
8 single review. Now, in the limited time remaining this approach is not feasible, introducing
9 unnecessary and elevated costs that will be borne by Cerner.⁸

10 An award of fees and costs is accordingly necessary and appropriate under Fed. R. Civ. P.
11 37(b)(2)(C). As explained above, it is plain that the belated production violated both the letter and
12 the spirit of the Court's Order on Motions to Compel (as extended), which required production of
13 the spoliated materials from the UAE by a specific date. An award of fees and costs caused by the
14 untimely production is appropriate because it is "specifically related to the particular claim which
15 was at issue in the order to provide discovery." *See Adriana Int'l Corp. v. Thoeren*, 913 F.2d 1406
16 n.6 (9th Cir. 1990). Moreover, the recent violation comes after a long history of obstruction and
17 spoliation that has hindered the efficient litigation and resolution of this matter. The cost and
18 burden now lies entirely with Cerner unless this Court takes corrective measures in the form of an
19 award of costs and fees.

20 **CONCLUSION**

21 In short, Cerner faces extreme and manifest prejudice because of the Debtors' failure to
22 timely comply with this Court's discovery orders. This Court has already recognized that prejudice
23 previously when it ordered evidentiary sanctions against the Debtors for their spoliation of this
24 very evidence, and should renew those sanctions here for the same reasons. Cerner respectfully
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⁸ Not to mention the burden of a huge document review being added to an already-busy trial team.

requests that the Court grant this motion and enter an order precluding the Debtors and their experts from:

(1) relying on or introducing any of the belatedly-produced materials;
(2) presenting any testimonial or documentary evidence based on such materials; and
(3) from opposing Cerner's introduction or characterization of any such materials to support Cerner's claim.

Cerner further requests and award of costs and fees under Fed. R. Civ. P. 37(b)(2)(C).

Cerner further requests that the Court expressly permit further requests for relief as may be shown to be appropriate by further review and analysis of the belatedly-produced materials or further developments in this matter.

DATED March 18, 2024.

Respectfully submitted,

HOLLAND & KNIGHT LLP

By: s/ Garrett S. Garfield

Garrett S. Garfield, WSBA No. 48375
E-mail: garrett.garfield@hklaw.com
601 SW Second Avenue, Suite 1800
Portland, Oregon 97204
Telephone: 503.243.2300
Fax: 503.241.8014

Warren E. Gluck, *Pro Hac Vice*
E-mail: warren.gluck@hklaw.com
31 W. 52nd Street
New York, New York 10019
Telephone: 212.513.3200

Richard A. Bixter Jr., *Pro Hac Vice*
Email: richard.bixter@hklaw.com
150 N. Riverside Plaza, Suite 2700
Chicago, Illinois 60606
Telephone: 312.422.9032

Attorneys for Cerner Middle East Limited

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/s/ Garrett S. Garfield

HOLLAND & KNIGHT LLP
601 SW Second Avenue, Suite 1800
Portland, OR 97204
Telephone: 503.243.2300